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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. .....

VIBERT CLARENCE HEATH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

and

FRANKLIN DAVID SHEPARD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals, Sixth Circuit

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I

OPINIONS BELOW

The defendant-petitioners below were tried in the United States District Court for the Eastern District of Tennessee for violation of Internal Revenue Laws with regard to non-

taxpaid whiskey. They filed a motion to suppress the evidence against them on the grounds that it had been obtained against them illegally in violation of their rights under the 4th Amendment to the Constitution of the United States. The United States District Court determined this issue against the defendant-petitioners and filed an opinion dated June 30, 1970. The Circuit Court of Appeals for the Sixth Circuit affirmed this decision in a Per Curiam order filed on April 24, 1972.

II

GROUNDS FOR JURISDICTION OF THIS COURT

A Per Curiam Order was filed by the United States Circuit Court of Appeals for the Sixth Circuit on April 24, 1972. In that Order, the Court of Appeals decided a federal constitutional question pertaining to the requirements for a search warrant under the 4th Amendment to the United States Constitution in conflict with applicable decisions of this Court as well as other Circuit Courts of Appeal.

III

QUESTIONS PRESENTED FOR REVIEW

(A) Does the description of premises to be searched contained in a search warrant meet the requirement of the 4th Amendment that the premises to be searched be particularly described when the description more reasonably and clearly describes premises other than those searched?

(B) Was the information set out by Affiant in the affidavit for a search warrant that a reliable informant told him there was a distillery located on the premises without setting out any of the underlying circumstances together with Affiant's statement that from a position on a public

road 100 yards distance from the premises he smelled the odor of fermenting mash, sufficient to meet 4th Amendment requirements that the affidavit must show probable cause for the issuance of a search warrant, particularly where the evidence in the record does not support the information?

(C) Where officers encroached upon the private driveway of a residence to verify a suspicion that the odor of fermenting mash was coming from said residence, may such information be used to establish probable cause for the obtainment of a search warrant?

IV

CONSTITUTIONAL PROVISION

The 4th Amendment to the United States Constitution provides "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

V

STATEMENT OF THE CASE

The defendants, together with Marvin Glenn Daugherty, were indicted by the Grand Jury in Knoxville, Tennessee, on May 5, 1971. The indictment included six (6) counts alleging violation of the Internal Revenue Laws of the United States with regard to nontaxpaid whiskey.

A motion to suppress the evidence was filed for the defendants. At the hearing on the motion to suppress the following evidence was adduced.

On Saturday, December 26, 1970, Officers Dowling and Irwin, from the Knoxville Police Department, followed the defendant, Shepard, from the City of Knoxville, to a location on Wolfe Valley Road, in Anderson County, Tennessee. Tr. p. 32. These officers knew that the defendant, Shepard, had theretofore brought moonshine whiskey to Knoxville, Tennessee. On December 28th, they advised Agent Riddle what had transpired.

On the evening of December 28, 1970, Agent Riddle accompanied the two Police Officers from Knoxville to the driveway on Wolfe Valley Road, where Officers Dowling and Irwin had seen the defendant, Shepard, turn in on December 26, 1970. Tr. p. 24. Officer Dowling and Agent Riddle got out of the car on the public road where Agent Riddle smelled a faint odor of mash, but he had to go down the private driveway to within 50 yards of the house to determine that this was the house from which the odor was emanating. Tr. pp. 52, 55. There was no fence around the house or outbuildings. Tr. pp. 52, 53, 55.

The officers returned to Knoxville, Tennessee, where, on December 29, 1970, Agent Riddle obtained a search warrant for the premises. Tr. p. 55. Agent Riddle stated in his affidavit for a search warrant that "On December 28th, I received information from a reliable informer who had given me information in the past, that proved reliable, that a distillery was set up in the above described premises, I smelled the distinct odor of fermented mash emanating from the premises. I have been a special investigator for the Alcohol, Tobacco, and Firearms for twelve years, and I am very familiar with the odor of fermenting mash."

The search warrant described the premises to be searched as follows: "On the premises known as John Doe residence, located at the intersection of the Wolfe Valley Road and U. S. Highway 25-W, east of Clinton,

Tennessee, drive north on the Wolfe Valley Road, 4½ miles to a driveway, turn right on driveway, and proceed one hundred yards to a white frame house and outbuildings, Anderson County, in the Eastern District of Tennessee, there now being concealed certain property, namely, an unregistered distillery-fermented mash, fit and intended for use in violation of the Internal Revenue Laws. Tr. p. 5.

On December 30, 1970, Agent Riddle, together with Officers Dowling and Irwin returned to the premises leased by the defendant, Shepard, arrested the defendants and searched the premises, and seized the property and evidence utilized against them at the trial. Tr. p. 53.

The premises searched had been leased by the defendant, Shepard, from the owner, Cardwell. Tr. p. 10. The leased premises were located 4.3 miles north of the intersection of Wolfe Valley Road and Highway 25-W. Tr. p. 37. The house on these premises was some 500 to 600 feet off of Wolfe Valley Road in a wooded area, and the outbuildings were beyond the house. Tr. p. 42. The house was a rusty color. Tr. p. 44. The driveway leading to the premises leased by Shepard from Wolfe Valley Road was barely visible, and then only when one was on top of it. Tr. pp. 38, 39. There is a house owned by the Harrell family exactly 4½ miles from the intersection of Highway 25-W and Wolfe Valley Road, with a driveway on the right, which is readily apparent from Wolfe Valley Road. Tr. pp. 37, 41. This is a white house setting some 200 feet off of Wolfe Valley Road, and with a barn and other outbuildings some 100 yards off the road. Tr. pp. 39, 41. There were other houses in the immediate vicinity of the driveway leading to the premises leased by the petitioner Shepard. Tr. p. 14.

The court, after hearing the foregoing evidence, denied the petitioners' motion to suppress the evidence and upon

trial the petitioners were convicted. Petitioner Heath was sentenced to five years in the penitentiary and Petitioner Shepard was sentenced under the Youth Corrections Act.

The petitioners perfected their appeal to the United States Court of Appeals for the Sixth Circuit and among other errors urged that the evidence used against them, was obtained in violation of their rights under the 4th Amendment to the United States Constitution. That Court, in its Per Curiam Order dated April 24, 1972, affirmed the judgment of the United States District Court, for the Eastern District of Tennessee.

VI

ARGUMENT

A

The Description of the Premises to Be Searched in the Search Warrant Did Not Particularly Describe the Premises to Be Searched.

The 4th Amendment to the United States Constitution requires that the search warrant particularly describe the premises to be searched. In the instant case the description set out in the warrant particularly describes the Harrell premises and not the premises leased by petitioner Shepard. The following chart compares the descriptive words of the warrant with the description of the premises in the record.

SEARCH WARRANT	PETITIONER SHEPARD'S PREMISES	HARRELL PREMISES
Driveway on right	Driveway on right	Driveway on right
4½ miles from interstate	4.3 miles from interstate	4½ miles from interstate
White frame house	Rusty colored house	White frame house
House and outbuildings 100 yards off road	House and outbuildings 500-600 feet off road	House and outbuildings 200-300 feet off road

With regard to the 4th Amendment requirement that the search warrant must particularly describe the premises to be searched, this Court held in Steele v. United States, 267 U.S. 498, 69 L. Ed. 757 (1925), that "it is enough if the description is such that the officer with the search warrant can with reasonable effort ascertain and identify the place intended." From this chart, it is readily apparent that the description contained in the search warrant would clearly lead one to the Harrell premises rather than the premises of the petitioner Shepard. In any event, from this description there is no way that a

person could with reasonable effort ascertain and identify the place intended to be searched to be the premises of the petitioner Shepard. Since the evidence clearly shows that the description contained in the warrant is more descriptive of premises other than those searched, an officer could not with reasonable effort ascertain and identify the place intended. To say the least, the description could have pertained to more than one premises, and in cases where the description of the premises to be searched set out in warrant may reasonably lead officers to more than one premises, the lower courts have consistently held that such search warrants to be void and of no effect. Keininghan v. U. S., 287 F. 2d 126; McGinnis v. U. S., 227 F. 2d 598; U. S. v. Kozman, 267 Fed. 866; U. S. v. Alexander, 278 Fed. 308; U. S. v. Mitchell, 274 Fed. 128; U. S. v. Hinton, 219 F. 2d 324; U. S. v. Epstein, 33 F. 2d 982; Fall v. U. S., 33 F. 2d 71; U. S. v. Barkouskas, 38 F. 2d 837; U. S. v. Higgins, 428 F. 2d 232.

The language of the court in Giacolone v. U. S., 13 Fed. 2d 109, is pertinent. "Thus, the description of a building as situate on a certain lot or even on a certain section of land would be ample if there was but one building on the block or section; whereas on other circumstances it would be no description at all." The Petitioners submit that the evidence in the record shows that the description of the premises contained in the search warrant is no description at all since it did not particularly describe the petitioner Shepard's premises as the premises to be searched and that from the description, no one could with reasonable effort ascertain from this description that it was the petitioner Shepard's premises that were to be searched.

B

The Information Contained in the Affidavit and Search Warrant Was Inadequate to Establish Probable Cause Warranting the Issuance of a Search Warrant and the Evidence Did Not Support the Information Set Out in the Affidavit.

Agent Riddle states in the affidavit, "On December 28th I received information of a reliable informer, who has given me information in the past that has proved reliable, that a distillery is set up in the above described premises."

This statement is wholly inadequate to establish probable cause, because it does not set out any of the underlying circumstances from which the informer determined that there was a still operating on these premises. Aquilar v. U. S., 391 U. S. 320; Spineli v. U. S., 393 U. S. 410; U. S. v. David, 402 F. 2d 171. Moreover, the evidence shows that Officer Dowling was the so called confidential informer, since the affiant states that he received the information that there was a distillery set up on these premises on December 28, 1970, and Dowling testified that that was the date that he followed Shepard to these premises. The wisdom of this Court's holding in Spineli v. United States, *supra*, requiring that some of the underlying circumstances be set out in the affidavit is demonstrated by this case. Here Officer Dowling knowing Shepard had delivered whiskey to Knoxville, followed Shepard to the premises where he turned into the driveway. Certainly this afforded Dowling no basis for informing the affiant that there was a distillery set up on these premises. Surely a known whiskey violator may turn into a driveway of his own house, a wholly innocent act, without giving police probable cause that a still is being operated in the house. The defendant-petitioners submit that no weight

should be given to the hearsay conclusion of the informant since the record shows that there was no basis in fact for the conclusion.

Agent Riddle further stated in the affidavit that from a position on the public road near the premises he smelled the odor of mash emanating from the premises. It should be noted however, that he described the premises in the search warrant as being 100 yards off the public road. There is no indication in the affidavit of whether there were other premises in the immediate vicinity of the public road from which the odor might have been emanating, or how he was otherwise able to determine from such a distance that the odor was emanating from these premises. In fact, Agent Riddle testified when he got out of the vehicle on the public road, he smelled a faint odor of mash and that to learn where the odor was emanating he walked a considerable distance down the private driveway leading to Petitioner Shepard's premises before he was sure that the odor was emanating from these premises. This testimony clearly shows that the information in the affidavit to the effect that he smelled odor of mash from the public road was, to say the least erroneous, for at that time Agent Riddle acknowledges in his testimony that he did not know from whence the odor had emanated and that it was only after he had walked down the driveway a considerable distance that he could be sure from which premises the odor was emanating.

Petitioners submit that the information set out in the search warrant and the affidavit with regard to the odor of fermenting mash is not in sufficient detail to establish probable cause. Although the odor of mash had been held a strong circumstance in determining whether probable cause exists, Johnson v. U. S., 333 U. S. 10; but see Ventresca v. U. S., 390 U. S. 102, in none of the cases where it has been so considered, was the officer so far removed from the premises from which the odor was al-

legedly emanating. For the Magistrate to have given any weight to this information, more detail with regard to the number of buildings in the area, direction of wind, etc. was needed.

The petitioners submit that no weight may be given to affiant's statement that he smelled the odor of mash at the public road, because this statement is contrary to affiant's testimony.

The evidence in this record shows that there was no basis for either the hearsay conclusion of the so-called reliable informant that there was a distillery set up on the premises, or the statement that Agent Riddle smelled the odor of mash from the public road set out in the affidavit. It follows and the petitioners submit that the search warrant was improperly issued because there was no probable cause as required by the 4th Amendment. Therefore, the evidence used against them should have been suppressed.

C

Any Evidence of Probable Cause Was Obtained by the Law Enforcement Officers Unlawfully Entering and Trespassing Upon the Defendants' Premises.

The testimony of Agent Riddle and Officer Dowling clearly established that they walked from the public road down the private driveway belonging to the defendant, Shepard, to a point where they could see the house and the outbuildings some fifty yards away, where they testified they were able to detect the odor of mash and determine that it was emanating from said house or outbuildings.

In today's world of the automobile, it would seem obvious that a private driveway to a home located just off of a public highway would be part and parcel of the curtilage belonging to a dwelling, particularly since the

dwelling, driveway, and outbuildings were not in any way fenced. The word houses in the 4th Amendment to the United States Constitution includes the curtilage or ground and buildings surrounding the house which is necessary for the use of the house for family affairs. Rosencranz v. U. S., 356 F. 2d 310. The defendants submit that this unlawful intrusion on to the curtilage of the Petitioner Shepard's premises where the officers testified that they were able to detect the odor of mash emanating from the house or outbuildings, was a violation of their constitutional rights and that the information they obtained while so unlawfully on the premises could not be utilized in determining whether there was probable cause for issuance of a search warrant. James v. U. S., 418 F. 2d 1150; Duran v. U. S., 413 F. 2d 596; U. S. v. Heft, 413 F. 2d 1027; Monnette v. U. S., 299 F. 2d 847; McGinnis v. U. S., 227 F. 2d 598; Callabran v. U. S., 276 F. Supp. 284; U. S. v. Sims, 303 F. Supp. 65.

Moreover, the 4th Amendment protects people's rights to privacy, that is, the right to be left alone and not places.

What a person knowingly exposes to the public in his home or office is not protected by the 4th Amendment, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Katz v. U. S., 389 U. S. 347.

In the instant case, like Katz, the record shows that the defendant had attempted to preserve his activities in private, and such privacy was thwarted by law officers trespassing on the private driveway leading to the home of the Petitioner Shepard. There could be no constitutional difference between the use of the device in the Katz case to infringe upon his right to privacy and the use of the private driveway in the instant case in obtaining evidence of illegal activity.

The language of Justice Day in Weeks v. U. S., 232 U. S. 383; is applicable here.

> "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting the accused to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgment of the Courts which are charged at all times with the support of the Constitution to which people of all conditions have the right to appeal for the maintenance of such fundamental rights. The efforts of the Courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of the great principles established by years of endeavors and suffering which have resulted in their embodiment in the fundamental law of the land."

VI

CONCLUSION

WHEREFORE, for the reasons above stated the petitioners pray this honorable Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit for review of its decision in this case and direct the Clerk of the Court of Appeals to forward a certified copy of the record below for this purpose.

Respectfully submitted

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APPENDIX A

Nos. 71-1810 and -1811

United States Court of Appeals for the Sixth Circuit

United States of America,
Plaintiff-Appellee,

vs. No. 71-1810

Vibert Clarence Heath,
Defendant-Appellant.

United States of America,
Plaintiff-Appellee,

vs. No. 71-1811

Franklin David Shepard,
Defendant-Appellant.

On Appeal from United States District Court, for the Eastern District of Tennessee, Northern Division.

PER CURIAM ORDER

(Filed April 24, 1972)

Before Phillips, Chief Judge, Weick, Circuit Judge, and Rubin,* District Judge.

The principal argument on appeal was that the District Court erred in denying appellants' motion to suppress evidence. It was argued that the affidavit in support of the search warrant and the evidence at the hearing did not establish probable cause; and that the search warrant did not sufficiently describe the premises where the dis-

* The Honorable Carl B. Rubin, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

tillery was operated and where a large quantity of untax-paid whiskey was found. We disagree. In our opinion the Special Agent of the Alcohol Tax Unit had probable cause to execute the affidavit. He stated therein that he had received information from a reliable informer that a distillery had been set up on the premises; and he personally visited the premises from a position on a public road and smelled fermenting mash emanating therefrom.

While the description of the premises prepared by the officer was not as accurate as one prepared later by a surveyor, it was sufficient to enable the officer and others to locate the distillery which was being operated by appellants on land leased by appellant Shepard.

We find no prejudicial error in the admission of evidence or in the instructions of the Court to the jury.

The judgment of the District Court is affirmed.

Entered by Order of the Court.

JAMES A. HIGGINS
Clerk

APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Northern Division

United States of America v. Marvin Glenn Daugherty, Vibert Clarence Heath, Franklin David Shepard	Criminal No. 17,896

OPINION AS RENDERED FROM THE BENCH

(Filed June 30, 1971)

Defendants are charged with a violation of the Internal Revenue Laws with regard to nontaxpaid whiskey. Specifically, the indictment charges possession of a still for the production of spiritous liquors; carrying on the business of a distillery without giving bond as required by law; operation of an unregistered distillery; making and fermenting mash fit for distillation; possessing a quantity of distilled spirits in containers not having affixed thereto stamps evidencing the determination of the tax; and possessing property which was intended for use in violation of 26 U.S.C., § 5686.

Defendants have moved to suppress all the evidence obtained by the Government officers in the building where the still and distilling apparatus were allegedly found upon the ground that the search warrant issued by Magistrate Duggin on December 29, 1970 was obtained in violation of defendants' constitutional rights and F.R.Cr.P. 41.

It is asserted that the warrant shows on its face that it does not describe the owner of the premises to be searched when such information would be readily available; the description of the premises is too vague, uncertain and insufficient to identify the premises. In the opinion of the Court each contention is without merit.

The search warrant described the property as the Joe Doe residence, located by beginning at the intersection of the Wolf Valley Road and U. S. Highway 25W East of Clinton, Tennessee, drive north of the Wolf Valley Road 4.0 miles to a driveway, turn right on[to] driveway and proceed 100 yards to a white frame house and all outbuildings, Anderson County, Tennessee. This description is sufficient to enable a reasonable person to find the property from the description in the warrant. **Steele v. United States**, 267 U.S. 498 (1925); **Townsend v. United States**, 253 F.2d 461 (C. A. 5, 1958); **Fine v. United States**, 207 F. 2d 324 (C. A. 6, 1953); **United States v. Harmon**, 317 F. Supp. 923 (E.D.Tenn., 1970); **United States v. Ortiz**, 311 F.Supp. 880 (D.Colo., 1970).

It is further claimed that the warrant was issued without probable cause. The affiant who appeared before Magistrate Duggin for the search warrant stated that on December 28 he received information from a reliable informant who had given him information that had proved reliable that a distillery was set up in the above-described premises. At about 8:00 P.M. on December 28, 1970, the affiant proceeded to the public road near the described premises and smelled a distinct odor of fermenting mash emanating from the premises. The affiant, an experienced investigator for the Alcohol, Tobacco and Firearms Unit, stated he was familiar with the odor of fermenting mash. The affiant testified that he had obtained the information, or a portion of it, without going on the curtilage of the owner or the lessee of the property where the contraband

whiskey was found. The smelling of the whiskey plus any information from a reliable informant was sufficient to convince the Magistrate that probable cause existed for the belief that the law was being violated at the premises where the still was found. **United States v. Ventresca**, 380 U.S. 102 (1965); **Giordenello v. United States**, 357 U.S. 480 (1958); **Draper v. United States**, 358 U.S. 307 (1959); **United States v. Freeman**, 358 F.2d 459 (C. A. 2, 1966); **United States v. Lewis**, 392 F.2d 377 (C. A. 2, 1968).

The other point made in the motion is that the owner or lessee of the property was not named in the search warrant and this was a violation of the rights of such owner or lessee of the property. This contention, in the opinion of the Court, is without merit as it was not necessary under the circumstances shown in this record to name the owner of the property in order to procure a valid search warrant. **Dixon v. United States**, 211 F.2d 547 (C. A. 5, 1954).

A jury is waiting to determine the merits and the Court will not go further into detailed reasons for overruling the motion.

ROBT. L. TAYLOR
United States District Judge